LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 12 1970
JOHN F. DAVIS, CLERK

1068

IN THE SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

PETITION FOR CERTIORARI

Bertie E. Tubaugh
Counsel for Petitioners
530 Springvale Road
Great Falls, Va. 22066
Telephone: 759-2325

IN THE SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

CHARLES E. BURNS, JR., et al
Petitioners

vs.

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA
Defendants

} RECORD NO.

PETITION FOR CERTIORARI

1. The Virginia Supreme Court of Appeals at Richmond has refused plaintiffs a writ of error to a judgment rendered by the Circuit Court of Fairfax County on May 14, 1969, sustaining Defendants' demurrer to a petition for a writ of mandamus filed by Plaintiffs to compel the Fairfax County Board of Supervisors, its agents, employees, and any one acting under its direction to tax complainants' land on its present use value, and refund or allow credit for the taxes in excess thereof previously levied.

2. A copy of the judgment of the Virginia Supreme Court of Appeals dated October 14, 1969, is appended hereto.

3. It is believed that the Fourteenth Amendment to the United States Constitution confers jurisdiction on this court to review the judgment in question by writ of certiorari. The Fourteenth Amendment provides in relevant part that "No State shall . . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws."

4. The assessed values of Plaintiffs' individual tracts of farm land on which they are residing were arbitrarily increased in 1966 and 1967 to more than four times what they had been the year before for no legal reasons.

5. Mandamus action was brought under Section 17-123 of the Code of Virginia 1950, as amended, which reads in relevant part as follows: "The circuit courts shall have jurisdiction . . . . to issue writs of mandamus in all matters or proceedings arising from or pertaining to the action of boards of supervisors or other governing bodies of the several counties for which such courts are respectively held or in other cases in which it may be necessary to prevent the failure of justice and in which mandamus may issue according to the principles of common law."

6. It is well settled that mandamus will not lie to control or review the acts of public officers in matters in which they have been vested with discretion "in the absence of arbitrary action, or refusal to exercise their discretion . . . ." (Andrews vs Shepherd, 201 Va. 412, 111 S.E. 2d at 282). The action of Defendants in Plaintiffs' case has been arbitrary and an exception to the rule.

7. The borrowing of money by Fairfax County is tied to assessed valuations of real estate and the assessors are being pushed into an improper policy-making role with regard to local government financing. Assessed values are increased instead of the rate which is a percentage of assessed value and is equal on all real estate at the same time. Prior to any increase in the tax rate in the County a public hearing is required and citizens are given an opportunity to appear before the local governing body and be heard on the subject of such increase. (Sec. 58-846.1 (1968 Supp.)) This is not done when assessed values are increased.

8. The most important question presented for review is the interpretation of "fair market value", a nebulous, vague, confused and fluid term meaning many things to many people. Does it mean "fair market value" for a present bona fide use?

. . . or for a future use?

9. In a case decided by the Supreme Court of Florida on the assessment of farmland the court stated: "Assessed valuations of land based on estimates of its highest and best potential, as distinguished from present bona fide use, are bound to be largely conjectural; and when an assessor, contrary to legislative intent and direction determines that land despite its present value has a truly higher present value because of its potential for some other "higher" purpose, he indulges in unwarranted speculation and does violence to the constitutional and statutory objective of just valaution. The assessor, like the courts, should operate within the record and not de-hors it." (Lanier v. Overstreet 175 So 2d 521-1965)

10. Our petition for a writ of certiorari is filed in order that justice may be done.

Charles E. Burns, Jr.
P.O. Box 7,
Great Falls, Virginia 22066

Louis V. Facchina
511 Utterback Store Road,
Great Falls, Virginia 22066

Russell F. Hogeland
9748 Leesburg Pike,
Vienna, Virginia 22180

James A. S. Roy
Mrs. Ethel M. S. Roy
311 Walker Road,
Great Falls, Virginia 22066

Ernest P. Finger
621 Springvale Road,
Great Falls, Virginia 22066

J. B. Thompson
9232 Leesburg Pike,
Great Falls, Virginia 22066

M. V. Leigh
9305 Leesburg Pike,
Vienna, Virginia 22180

H. Houston DeRamus
9414 Atwood Road,
Vienna, Virginia 22180

Grace L. Turner (Mrs. Mark, Sr.)
10609 Georgetown Pike,
Great Falls, Virginia 22066

Edmond E. Thompson
9500 Leesburg Pike,
Great Falls, Virginia 22066

Mrs. Grace T. Sheets
9400 Leesburg Pike,
Great Falls, Virginia 22066

Henry Y. Gouldman
Mrs. May L. Gouldman
10500 Georgetown Pike,
Great Falls, Virginia 22066

Edward A. Wiesman
9518 Leesburg Pike,
Vienna, Virginia 22180

Nicholas Yaworski
1356 Ingleside Ave.,
McLean, Virginia 22101

Mrs/ Bertie E Tubaugh

By Bertie E. Tubaugh
Counsel for Petitioners
530 Springvale Road
Great Falls, Va. 22066
Telephone: 759-2325

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday *the* 14th *day of* October, 1969.

The petition of Charles E. Burns, Jr., Louis V. Facchina, Russell F. Hogeland, James A. S. Roy, Mrs. Ethel M. S. Roy, Ernest P. Finger, J. B. Thompson, M. V. Leigh, H. Houston DeRamus, Grace L. Turner (Mrs. Mark, Sr.), Edmond E. Thompson, Mrs. Grace T. Sheets, Henry Y. Gouldman, Mrs. May L. Gouldman, Edward A. Wiesman and Nicholas Yaworski for a writ of error to a judgment rendered by the Circuit Court of Fairfax County on the 14th day of May, 1969, in a certain proceeding then therein depending, wherein the said petitioners were plaintiffs and the Board of Supervisors of Fairfax County was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By

R. P. Henderson
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing Petition for Certiorari, postage prepaid, this 12th day of January, 1970, to Mr. Donald C. Stevens, County Attorney, Counsel for Defendants, 4100 Chain Bridge Road, Fairfax, Virginia, 22030.

Mrs/ Bertie E Tubaugh

Bertie E. Tubaugh

TABLE OF CASES AND AUTHORITIES

Page

Supreme Court of The United States

Branson v. Bush, 251 U.S. 182, 40 Sup. Ct. 113, 64 Law. Ed. 215 7

Cardinale, Jr. v. State of Louisiana, U. S., 22 Law. Ed.2d 398, 89 Sup. Ct. (1969) 1

Virginia Supreme Court of Appeals

Andrews v. Shepherd, 201 Va. 412, 111 S.E.2d 279 (1959) 8

Hall v. Stuart, 198 Va. 315, 94 S.E.2d 284 (1959) 7

Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958) 5, 6

Constitution of the United States

Amendment XIV 1

Constitution of Virginia (1902), as amended

Article XIII, § 169 2

Code of Virginia, 1950, as amended:

§ 8-707 ..... 4, 5

§ 15.1-13 3

§ 15.1-612 3

§ 15.1-605 3

§ 17-123 7

§ 58-1145 ..... 3, 9

IN

The Supreme Court Of The United States

AT WASHINGTON, D. C.

October Term, 1969

Record Number 1063

CHARLES E. BURNS, JR., et Al.,
Petitioners,

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO THE *GRANTING OF A WRIT OF CERTIORARI*

JURISDICTION

Petitioners rely upon the Fourteenth Amendment to the Constitution of the United States for jurisdiction in this Court. Respondent respectfully submits:

a. That Rule 21 of the Rules of this Court have not been complied with, for the reason that Petitioners have not submitted a transcript of the Record in the courts below.

b. That no substantial Federal question has been raised in the courts below, or in the Petition for a Writ of Certiorari filed herein. *Cardinale, Jr.* v. *State of Louisiana*, ... U. S. ....., 22 Law Ed.2d 398, 89 Sup. Ct. ..... (1969), wherein this Court spoke as follows:

> "And in a Federal system it is important that State Court be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statute may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adquate state ground." (22 Law. Ed.2d, at 400.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF VIRGINIA (1902), as amended:

Article XIII, § 169—Except as hereafter provided, all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. So long as the State shall levy upon any public service corporation, other than a railway or a canal corporation, a State franchise, license, or other tax, based upon or measured by its gross receipts, or gross earnings, or any part thereof, its real estate and tangible personal property shall be assessed by the State Corporation Commission, or other central State agency, in the manner prescribed by law. The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added. The General Assembly may define as a separate subject of taxation household goods and personal effects and may allow the governing bodies of counties, cities, and towns to exempt or partially exempt such property from taxation.

* * * *

Title 15.1 (Counties, Cities and Towns), Chapter 13 (County Executive and County Manager Forms of Government), Article 11 (County Executive Form), Section 15.1-612. Department of Assessments—

The Department of Assessments, if and when established, shall be headed by a Commissioner of the Revenue or a Supervisor of Assessments, who shall exercise all powers conferred and perform all the duties imposed by para. (c) and (d) of § 15.1-605 upon the Director of Finance.

In addition to the powers and duties hereinabove conferred, the governing body of any county which has provided for a Department of Assessments headed by a Supervisor of Assessments may, in lieu of the method now prescribed by law, provide for the annual assessment and equalization of assessments of real estate by such department. All real estate shall thereafter be assessed as of January 1st of each year. Any person aggrieved by any such assessment may apply for relief to the Circuit Court of the County as provided by law. The provisions of this section shall not, however, apply to any real estate assessable under the law by the State Corporation Commission.

* * * *

Title 58 (Taxation), Chapter 22 (Erroneous Assessments), Article 11 (Local Levies), Section 58-1145. Application to Court to Correct Erroneous Assessments of Local Levies Generally—

Any person assessed with county or city levies or other local taxes on real estate, aggrieved by any such assessment, may, unless otherwise specially provided by law, within two years from the 31st day of December of the year in which any such assessment is made, and any person assessed with local levies on personal property or a local license tax, aggrieved thereby, may,

within one year from the 31st day of December of the year in which such assessment is made, apply for relief to the Circuit Court of the County or any City court of record of the city wherein such assessment was made. In such a proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or if the court in its discretion finds the ends of justice would be met by making an adjustment, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made.

In the event it comes or is brought to the attention of the Commissioner of Revenue of the locality that the assessment of a parcel of real estate is improper or is based on obvious error, and should be corrected in order that the ends of justice may be served, the Commissioner shall apply to the appropriate court, in the manner herein provided for relief of the taxpayer. Such application may include a petition for relief of any of several taxpayers.

* * * *

Title 8 (Civil Remedies and Procedure), Chapter 31 (Mandamus and Prohibition), Section 8-707. Defense; how made—

If the defendant appear and make defense, such defense may be by demurrer, or answer on oath, to the petition, or by both, such answer to be subject to any just exceptions by the petitioner. The court may permit amendments to such petition, as in other cases, should the demurrer by sustained.

STATEMENT OF THE CASE

Petitioners herein initially filed a Petition for a Writ of Mandamus in the Circuit Court of Fairfax County, Virginia; the prayer for relief in said Petition is quoted, in its entirety, as follows:

"Wherefore, Complainants pray:

1. For a Writ of Mandamus commanding the Fairfax County Board of Supervisors, its agents, employees, and anyone acting under its direction to tax Complainants' land on its present use value, and refund or allow credit for the taxes in excess thereof previously levied, and

2. For such other relief as the nature of the case deems meet."

Respondent herein demurred to the Petition for a Writ of Mandamus, pursuant to § 8-707 of the 1950 CODE OF VIRGINIA, as amended; this demurrer was sustained by the Circuit Court of Fairfax County, Virginia, after hearing the arguments of counsel for both Petitioners and Respondent. No request was made by Petitioners for leave to amend their petition, and there was subsequently entered an order sustaining the demurrer and dismissing the cause.

Petitioners filed notice of appeal and assignments of error, and submitted to the Supreme Court of Appeals of Virginia its Petition for a Writ of Error, to which Respondent replied with a Brief in Opposition. Thereafter, the Supreme Court of Appeals of Virginia entered the order a copy of which is attached to the Petition for a Writ of Certiorari filed herein by Petitioners.

ARGUMENT

The Petitioner in this case has presented for review by this Court the question of the interpretation of the term "fair market value," and apparently alleges that the use of that term in the laws of the Commonwealth of Virginia somehow denies the Petitioners herein due process and/or equal protection of the law.

The Supreme Court of Appeals of Virginia has construed the term "fair market value" in the case of *Tuckahoe*

Woman's Club v. *City of Richmond,* 199 Va. 734, 101 S.E.2d 571 (1958), wherein the Court spoke as follows:

> "Section 169 of our Virginia Constitution provides that in 'all assessments of real estate and tangible personal property shall be at their fair market value' in *Seaboard Air Line Railway* v. *Chamblin,* 108 Va. 42, 60 S.E. 727, this court adopted the definition given by Lewis on Eminent Domain (2d Edition, page 478) that the fair market value of property 'is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it' that definition has been repeated without change in many subsequent cases, a recent one being *Skyline Swannanoa* v. *Nelson County,* 186 Va. 878, 44 S.E.2d 437.
>
> "In estimating that value, as said in the first named case, all the capabilities of the property and all the uses to which it may be applied for which it is adapted, are to be considered, but it is not a question of value of the property to the owner.
>
> "In *Lehigh Portland Cement Co.* v. *Commonwealth* 146 Va. 146, 135 S.E. 669, it was said that in most cases an assessment based on the original value of the property less depreciation would afford an equitable basis of taxation, but would ignore the plain provisions of § 169 of the Constitution that all assessments shall be at their fair market value, and whatever the rule may be in other jurisdictions the rule laid down in § 169 is 'the only legal rule provided by law for the assessment of real estate and tangible personal property situated in this Commonwealth'." (101 S.E.2d, at 573, 574)

That case arose on an appeal to the Supreme court of Appeals of a decision of the Hustings Court of the City of Richmond, which court had sustained the assessment, despite the fact that the assessor had agreed that his evaluation was of the special value for a special use to a particular owner, and it was his judgment that the value of the

property in the market place would be considerably less. The reverse is true, in the allegations of the Petitioners herein, who allege that the assessing officers of the County of Fairfax must evaluate the properties in question on the basis of the uses to which the individual owners see fit to put them rather than on a market place basis considering all of the uses to which the property might potentially be put.

This Court has said, with respect to evaluation on the basis of actual use that value results from uses both present and prospective, or actual and/or anticipated, and that ad valorem type taxation is not designed to be a tax upon the earnings of a particular property in a particular use. *Branson* v. *Bush*, 251 U.S. 182, 40 Sup. Ct. 113, 64 Law. Ed. 215.

This case arose on a petition for a writ of mandamus seeking direction by the Circuit Court to the governing body, which body is not charged by law with responsibility for assessing real estate, to make assessments at what the Petitioners call "present use value." Petitioner has correctly stated the provisions of § 17-123 of the 1950 CODE OF VIRGINIA, as amended, which provides that courts of record shall have jurisdiction to issue writs of mandamus "according to the principles of common law." In the case of *Hall* v. *Stuart*, 198 Va. 315, 94 S.E.2d 284 (1956), the Supreme Court of Appeals of Virginia said:

> "Mandamus should never issue unless the petitioner's right to it is clear. . . . it should be issued only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy, and it is never granted in doubtful cases."
>
> "One of the fundamental principles underlying the entire jurisdiction is that mandamus never lies where

the party aggrieved has another adequate remedy at law, by action or otherwise; and wherever an express remedy is afforded by statute, plain and specific in its nature, and sufficiently adequate to redress the grievance complained of, mandamus will not lie." (94 S.E.2d at 290)

In *Andrews* v. *Shepherd*, 201 Va. 412, 111 S.E.2d 279, (1959), the Supreme Court of Appeals said:

"It is well settled that mandamus is the proper remedy to compel to public officers, including municipal councils, to perform their ministerial duties, but that it will not lie to control or review the acts of public officers and municipal councils in matters in which they have been vested with discretion, in the absence of arbitrary action, or refusal to exercise their discretion." (111 S.E.2d, at 282)

It is the contention of Respondent herein that the dispute between the Petitioners and the assessing officials of the County of Fairfax turns on the value applied by those officials to the properties of the respective petitioners, and that the only order which properly could be entered in a mandamus action would be one requiring the assessing officials to follow the constitutional mandate of ascertaining the fair market value of the properties. It is in the discretion of the assessing officials, taking into account all of the information available to them, to ascertain a particular value for a particular parcel of property, and it is not the office of the extraordinary writ of mandamus to supervise or review the manner in which that particular discretion was exercised. As the Supreme Court of Appeals of Virginia has said in the case of *May* v. *Whitlow*, 201 Va. 533, 111 S.E.2d 804 (1960):

"A writ of mandamus is an extraordinary remedial process. It lies to compel performance of a ministerial act by a public official only when there is a clear

and unequivocal duty imposed by law upon the officer to perform the act. The absence of another adequate remedy at law is essential to its application." (111 S.E.2d at 807)

Respondent respectfully submits that § 58-1145 of the 1950 CODE OF VIRGINIA, as amended, provides precisely such a specific statutory remedy as is referred to in the foregoing cases by the Supreme Court of Appeals, and that therefore a mandamus proceeding is not a proper one in which to seek judicial review of the actions of the assessing officials of the County. In the alternative, Respondent submits that in the event the assessing officials were amenable to the entry of an order in the nature of a writ of mandamus, that it could only direct them to assess the property at fair market value, which was not the relief sought by the Petitioners in the trial court.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari for the following reasons:

1. That the Petition, in the absence of a transcript of the Record below, is not properly submitted under the rules of this Court.

2. That no substantial Federal question was presented or decided in the courts below, nor is a substantial Federal question presented by the Petition for a Writ of Certiorari.

3. That the granting of the relief sought would controvert the provisions of the Constitution and laws of the Commonwealth of Virginia, which Constitution and laws in the respects here questioned embody principles often

upheld both by the highest Court of the Commonwealth and by this Court.

Respectfully submitted,

DONALD C. STEVENS
County Attorney
Counsel for Respondent

CERTIFICATE

I hereby certify that I have on this 12th day of February, 1970, deposited in the United States Post Office at Fairfax, Virginia, with first-class postage prepaid, a copy of the foregoing Brief in Opposition, addressed to Bertie E. Tubaugh, Counsel for Petitioners, 530 Springvale Road, Great Falls, Virginia, 22066, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States.

.....

DONALD C. STEVENS
Counsel for Respondent

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 20 1970
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

1033

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Bertie E. Tubaugh
Counsel for Petitioners
530 Springvale Road
Great Falls, Va. 22066
Telephone: 759-2325

IN THE SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

CHARLES E. BURNS, JR., et al
Petitioners

vs.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA
Defendants

RECORD NO. 1063

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

1. JURISDICTION—Petitioners were denied due process of law under the 14th Amendment to the Constitution of the United States in that the state courts below sustained Defendants' Demurrer and removed the cause from the docket on which it had been placed for trial on its merits before the trial was held. At a trial Petitioners could have subpoenaed records and witnesses under oath to prove that the assessment procedures being used in Fairfax County to tax real estate are depriving Petitioners of the equal protection of the laws:

(a) Contrary to Respondent's allegation, Petitioners complied with U. S. Supreme Court Rule 21 by filing with their Petition for Certiorari a certified copy of the entire record of the Fairfax County Circuit Court in the case on which both the Circuit Court and the Virginia Supreme Court of Appeals based their judgments.

(b) Contrary to Respondent's allegation, the state courts were given the first opportunity to consider the constitutional questions raised under Sections 1, 5, 6, 11, 39, 58, 168, 169, and 188 of the Constitution of Virginia, and the Fourteenth Amendment to the United States Constitution, including the statutory laws enacted in pursuance thereof, and fully set forth in the Petition for the Writ of Mandamus which is a part of the certified copy of record filed with the Petition for Certiorari.

2. CONCLUSIONS—The facts in this case disprove Respondent's conclusions 1 and 2.

3. A decision in this case depends on the interpretation of the constitutional provision for assessment of real estate at its "fair market value," such interpretation being a prerogative of the courts based on all the facts and circumstances of the case involved.

Respectfully submitted,

Bertie E. Tubaugh

~~By~~ Bertie E. Tubaugh
Counsel for Petitioners
530 Springvale Road
Great Falls, Va. 22066
Telephone: 759-2325

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing Reply Brief to Brief in Opposition to Petition for Certiorari, postage prepaid, this 20th day of February, 1970, to Donald C. Stevens, County Attorney, Counsel for Respondent, 4100 Chain Bridge Road, Fairfax, Virginia, 22030.

Bertie E. Tubaugh